No. 12910

United States
COURT OF APPEALS
for the Ninth Circuit

CARL RUDEEN,

Defendant-Appellant,

vs.

R. G. LILLY and M. M. VALENTINE, doing business under the assumed name and style of LILLY AND VALENTINE TRUCKING CO.,

Plaintiffs-Appellees.

BRIEF OF APPELLEES

Appeal from the United States District Court for the District of Oregon.

HONORABLE JAMES ALGER FEE, *Judge.*

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STEVENS-NESS LAW PUB. CO., PORTLAND 11-51

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Upon reading appellant's brief alone one would gain the impression that the primary questions involved in this case are whether the president and general manager of the Great West Lumber Corporation had authority to execute a mortgage upon its sawmill and whether the

mortgage executed by him was in such form as to be void upon its face.

While these questions may properly be involved in this case it is important to note at the outset that the decision of the trial court in this case also involved the following questions: (1) Whether, even if the initial invalidity of the mortgage be assumed (as strongly denied by appellees), either for lack of authority or otherwise, there was a subsequent *ratification* of the validity of the mortgage by the corporation, and (2) whether defendant Rudeen, by virtue of his position as an officer and director of the corporation and his subsequent conduct in representing to appellees that his purchase of the sawmill would be *subject to the mortgage,* is estopped from and in no position to challenge the validity of the mortgage. (See Findings III, V and VI. R. 46-8.) Of even greater importance, it should be kept in mind that the decision of the trial court may be sustained by its determination on these latter two questions, regardless of the correctness of its decision on the question of the initial authority for and validity of the mortgage.

STATEMENT OF THE CASE

Plaintiff has devoted the first thirteen pages of his brief to a summary of the complaint, answer and reply in this case, but has made no reference whatever to the Pre-Trial Order, which sets forth both the admitted facts, contentions of the parties and issues involved on trial of this case and which, by stipulation of the parties, completely replaced the pleadings (R. 41). For a complete and accurate statement of these matters the attention of the court is thus directed to the Pre-Trial Order (R. 22-41) and to a subsequent amendment to the Pre-Trial Order (R. 42-3). Attention is also respectfully directed to the Findings of Fact by the trial court based upon these admitted facts, contentions and issues and upon the evidence submitted on trial (R. 43-52). These two documents, taken together, present a good understanding of this case. Accordingly, reference will be made to the "Statement of the Case" set forth in appellant's brief only to point out certain inaccuracies, leaving for argument a discussion of certain important facts altogether omitted and ignored by appellant.

Appellant's brief (p. 15) charges Mr. Balentine, one of appellees' attorneys, with preparing a mortgage which he knew to be false because it recited that it was given by authority of the board of directors and referred to attachment of the corporate seal. This is a serious charge and is made without documentation by reference to the record, other than to refer to the face of the mort-

gage itself. Indeed, when a mortgage is prepared by the attorney for a creditor of a corporation, he will normally have no knowledge when the mortgage is prepared as to the detailed facts of authorization for the signing of it by officers of the corporation and must normally assume that its execution has been or will be properly authorized and also that it will be properly sealed upon its execution. Thus the fact that when the mortgage was subsequently executed by Camozzi he may have had no express authority from the directors to sign that particular document and also failed to attach the corporate seal does not establish the serious charge that Mr. Balentine "*drew* this mortgage, knowing that it was false."

Appellant's brief (p. 15) next states that:

> "The Great West Lumber Corporation did not receive anything at the time of the execution of the mortgage other than to secure a prior existing debt for a release of the attachment or garnishment against Fleischman's Lumber Co., which had tied up some indefinite amount."

As to this charge it should be necessary only to refer to the Findings of Fact, Paragraph II (R. 45), which makes it clear that the execution of the mortgage was necessary to lift a pending attachment and thus was necessary to enable the corporation to resume sales of lumber and escape the danger of closing its mill, with the result that it was of substantial benefit. For evidence in support of this finding see copies of the record in the attachment proceedings, Ptf. Ex. 5 and 6; the testimony of Mr. Balentine, R. 91-3, and the Pre-Trial Order, par. 19, R. 28.

Appellant also (p. 16) apparently seeks to cast some doubts as to the amount actually due under the mortgage, although it was stipulated that the sum of $9,546.63 was due (R. 43) as subsequently decreed by the trial court (R. 54).

Next (pp. 16-17) appellant states that it does not appear where the trial court secured the description of the various items of machinery set forth in the decree as subject to the mortgage. But a complete description of all of such items was set forth in the notice of levy for sale of personal property for delinquent federal taxes (Dft. Ex. 25. See also Ex. 26 and 27) and it was stipulated in the Pre-Trial Order that these items included "all of the personal property described in the purported mortgage" (R. 33). Thus it was simply a matter for the court (based upon the language of these documents and the testimony of Charles Scott, R. 151-160), to determine which of the items to be sold were covered by the mortgage, as discussed below (pp. 33-6).

Finally, appellant states (p. 17) that it does not appear where the court got the figure of $3,369.32 for taxes awarded to Klamath County or the reason for such an award. This award was based upon stipulation, as stated in the Findings of Fact (R. 50). Apparently, through inadvertence, the written stipulation, filed Feb. 19, 1951 (R. 64) was not included by appellant in the record.

SPECIFICATIONS OF ERROR

Appellant next (p. 17) lists ten "questions presented," followed by eight "specifications of error" raising almost identical issues. It should thus be noted that the appellant's "Statement of Points on Appeal" was limited to the following:

> "1. The evidence is insufficient to support the findings of fact.
>
> "2. The findings of fact are clearly erroneous.
>
> "3. The evidence will support only findings of fact leading to conclusions of law requiring a decree for this Defendant in accordance with his contentions herein." (R. 59, 163).

In view of the fact that appellant had previously chosen to limit his appeal to the sufficiency of the evidence to support the findings of fact, it is submitted that Specifications of Error No. 3, 4, 6 and 7 are not properly before this Court, nor are "Questions Presented" No. 3, 4, 7, 8, 9 and 10.

Points and Authorities

1. The mortgage in this case was correctly held to be valid for the reasons that:

a. President and General Manager Camozzi had implied actual authority to execute the mortgage under the peculiar facts of this case, including the fact that he held a majority of the stock and that the other stockholders and directors had become inactive

and had turned over their powers to him and also in view of the emergency presented in this case.

Fletcher, Cyc. on Corporations, secs. 444, 449, 495, 557, 612, 690;

2 Am. Jur., Agency, secs. 89, 442;

19 C.J.S., Corporations, sec. 1062, pp. 593, 596;

Abraham v. American Nt. Bank, 161 Okl. 87;

Nt. State Bank v. Sanford Fork & Tool Co., 157 Ind. 10;

Tyler Estate v. Hoffman, 146 Mo. App. 510;

G. V. B. Mining Co. v. First Nt. Bank, 89 F. 439, aff. 95 F. 23;

Galbraith v. First Nt. Bank of Alexandria, 221 F. 386;

Cunningham v. German Ins. Bank, 101 F. 977;

Farmers' State Bank v. Brown, 204 N.W. 673;

Buchwald Delivery & Express Co. v. Hurst, 75 A. 111;

P. R. Sinclair Coal Co. v. Missouri-Hydraulic Mining Co., 207 S.W. 266.

b. Camozzi also had ostensible or apparent authority to execute the mortgage.

Fletcher, supra, sec. 449;

19 C.J.S., Corporations, sec. 1062;

Carstens Packing Co. v. Gross, 131 Or. 580, 584, 283 P. 20;

Thomas v. Smith-Wagoner Co., 114 Or. 69, 79; 234 P. 814;

Gore v. Richard Allen Mining Co., 61 Idaho 622;

Fischer v. Streeter Milling Co. (N.D.), 234 N.W. 392;

G. V. B. Mining Co. v. First Nt. Bank of Halley (C.A. 9), 95 F. 23, 30;

Merchants' Bank v. State Bank, 10 Wall. (U.S.) 604; 19 L. Ed. 1008;

American Nat. Bank v. Wheeler-Adams Auto Co., 141 N.W. 396;

Burke v. Frederickson, 268 N.W. 348.

c. The execution of the mortgage was ratified by the corporation.

Fletcher, supra, secs. 612, 706, 752, 757, 767, 769, 772, 773;

West v. Washington Ry. Co., 49 Or. 436, 445-6; 90 P. 666;

Currie v. Bowman, 25 Or. 364; 35 P. 848;

Reid v. Alaska Packing Co., 47 Or. 215, 220; 83 P. 139;

Cranston v. West Coast Life Ins. Co., 72 Or. 116, 130; 142 P. 762;

Depot R. Syndicate v. Enterprise B. Co., 87 Or. 560, 575; 171 P. 223;

Pettengill v. Blackman, 30 Id. 241;

Burke Land & Livestock Co. v. Wells Fargo & Co. (Id.), 69 P. 87, 93;

State ex rel v. Merchants' Bank of Weston (Neb.), 254 N.W. 675;

Ohio & M. Ry. Co. v. McCarthy, 96 U.S. 258;

Dillon v. Myers (Colo.), 146 P. 268, 272;

Edelhoff v. Horner-Miller Straw-Goods Mfg. Co. (Md.), 39 A. 314;

Banca Italiana Di Sconto v. Columbia Counter Co. (Mass.), 148 N.E. 105.

Pathe Exchange, Inc. v. McElroy (Mo.), 243 S.W. 430;

Indianapolis Rolling Mills v. St. L. F. S. & W. Ry., 120 U.S. 256.

d. Appellant Rudeen is not in a position to deny and is estopped from denying the validity of the mortgage.

Fletcher, supra, sec. 490;

Norment v. First Nat. Bank (N.M.), 167 P. 731;

Shawmut Comm. Paper Co. v. Overbach (Mass.), 101 N.E. 1000;

Boteler v. Conway (Cal.), 56 P. (2d) 587;

Page v. Savage (Id.), 246 P. 304, 308.

2. The court did NOT err in decreeing payment of taxes to Klamath County.

3. The court did NOT err in including a particular description of the property covered by the mortgage.

36 C.J.S., Fixtures, sec. 46;

First State Bank v. Oliver, 101 Or. 42, 51; 198 P. 920;

Metropolitan Life Ins. Co. v. Kimball, 163 Or. 31, 52-3; 94 P. (2d) 1101;

Kramer v. Alvord, 97 Or. 227, 231; 189 P. 990.

4. The court did NOT err in holding that the mortgage was superior to the title claimed by defendant Rudeen under the tax deed.

a. The mortgage was NOT VOID for lack of a corporate seal.

2-804, O.C.L.A.;

2-807, O.C.L.A.;

Fletcher, supra, sec. 2466, 7;

Brown v. Farmers' Supply Co., 23 Or. 541, 32 P. 548;

Schleef v. Purdy, 107 Or. 71; 214 P. 137;

16 Am. Jur., Deeds, sec. 100;

59 C.J.S., Mortgages, sec. 16;

Appellant's Brief, p. 22, point 4.

b. The recording of a mortgage not entitled to be recorded, while not conveying constructive notice, may still operate as actual notice and one who takes a subsequent deed with actual knowledge of such a mortgage cannot complain.

Williams v. First Nat'l Bank, 48 Or. 571; 87 P. 890;

Musgrove v. Bonser, 5 Or. 313;

45 Am. Jur., Records and Recording, sec. 172.

c. Appellant, as a Director of the Corporation, could not upon taking a tax deed claim that the tax lien destroyed the mortgage.

51 Am. Jur., pp. 919-920;

13 Am. Jur., pp. 960, 962;

76 A.L.R. (Anno.) 439;

Enyart v. Merrick, 148 Or. 331; 34 P. (2d) 629.

d. The representations and agreement that the tax sale would be SUBJECT to the mortgage are independent and conclusive answers to the contention that the tax title is superior to the mortgage.

5. Rule that statements of agent not admissible against principal to prove extent of his authority not applicable where, as here, (a) the point is not properly raised on appeal, (b) a third party, rather than principal, is involved, and (c) authority was also proved by other evidence.

Restatement of Law of Agency, sec. 285;
Rule 20(1)(d), Rules of Court of Appeals, 9th Circuit.

ARGUMENT

I. The trial court did NOT err in holding the mortgage to be valid.

A. *President and General Manager Camozzi Had Implied Actual Authority to Execute the Mortgage.*

Appellant contends that plaintiffs knew or should have known that President and General Manager Camozzi had no authority to execute the mortgage; that "the president or the general manager of a corporation have no authority in themselves *by virtue of their position,* to execute such a mortgage," which plaintiffs well knew; that they were not entitled "to rest upon the bare assertions of Camozzi himself" and that plaintiffs had the burden to prove his authority (Ap. Br. 25-8).

1. The Facts as to the Actual Authority of Camozzi.

This is not a simple case of a president or general manager of a corporation undertaking, solely by virtue

of his position, to execute a mortgage on its property. In this case it appears from the admitted facts in the Pre-Trial Order and otherwise that Camozzi was not only the president and general manager, but also owned a majority of the common stock (Ex. 19, p. 36) and was the only officer of the company (an Idaho corporation) present in Oregon, where its sawmill was located (R. 24-5); that the other stockholders and directors of the corporation became inactive, it appearing that subsequent to the organization of the corporation in November, 1946, the directors and stockholders each held only one meeting until after the execution of the mortgage on August 4, 1948 (Ex. 1); that other stockholders and directors took no active part in the affairs of the corporation or to supervise the activities of Camozzi, but delegated to him the power to conduct its affairs, and acquiesced in all of his acts until after the execution of the mortgage in question (Ex. 19, pp. 11-12, 19-20, 24-5, 31-2; Ex. 20, pp. 5-6, 40-1; Pre-Trial Order, par. 12, 13, R. 25-6); that the by-laws of the corporation expressly provided that while the Directors should ordinarily have power to buy, sell and mortgage any and all real and personal property, the general manager should have "full control of said business and officers when the Board of Directors is not in session" (Ex. 24, Art. IV, sec. 8, 9); that Camozzi had thus been permitted to purchase all of the equipment for the sawmill as well as all timber and real property, to conduct and direct all of its operations and even to borrow money under a contract committing the sale of the entire products of the sawmill to one purchaser (R. 25; See

also Ex. 4). These facts were, for the most part, found to be true by the trial court. See Finding I (R. 44-5). Appellant has made no attempt to challenge these facts.

It is also admitted that plaintiffs had been hired by Camozzi to haul lumber from the sawmill; that on July 31, 1948, the corporation was indebted to plaintiffs in the sum of $15,134.97 and that plaintiffs on that day filed two lawsuits, attached all of the lumber of the corporation, including lumber in the hands of the Lawrence Warehouse Company, to whom all of its lumber was to be delivered under contract and received a temporary restraining order stopping all lumber sales (R. 26-7; Ex. 4, 5 and 6). Camozzi immediately came to see plaintiffs and told them that he wanted to settle the matter immediately for the reason that the stopping of lumber sales would close the operation of the mill (R. 27, 73, 92). It was then agreed that the matter be settled by the execution of a note and mortgage and arrangements were rushed through to get the mortgage in question prepared and executed, following which the pending attachments and injunction were dismissed (R. 27-8; 92-5). The mortgage was prepared by Mr. Balentine, attorney for plaintiffs, under instructions from and upon the basis of information given to him by Camozzi, and was recorded on August 5, 1948 (R. 93-5; Ex. 10). It also appears from the foregoing that because of the stopping of all lumber sales and the threatened closure of the mill the corporation was faced with an emergency and that there was not time for Camozzi, in Klamath Falls, Oregon, to convene a meeting of the directors in Idaho pursuant to the By-Laws in order to give express

authorization for the execution of the mortgage and that its execution was of substantial benefit to the corporation by making possible a resumption of lumber sales and by preventing the closing of its sawmill. Again, these facts were found by the trial judge in Finding No. II (R. 45-6) and, it is submitted, are amply supported by the record.

2. Legal Principals on Question of Implied Actual Authority to Execute Mortgage.

The power of an officer of the corporation may rest either upon its organic law as expressed in its articles or by-laws, or upon delegation of authority from it or through its board of directors. Fletcher, supra, sec. 557. The directors may delegate to the officers matter involving discretion and judgment. Id., sec. 495. Such a delegation of power may be either express or implied. Id., sec. 557, and this includes the power to execute a mortgage. Id. sec. 3115; 19 C.J.S. on Corporations, sec. 1062, p. 593. As further stated in Fletcher, sec 449, "Implied authority is actual authority circumstantially proved."

Thus, although the president of a corporation has no power merely by virtue of his office to execute a mortgage, "such authority may be expressly conferred or *may be implied if he is in charge and control of the management of the company.*" Fletcher, supra, sec. 612, citing many cases. As stated in C.J.S., supra, p. 596, the power of the president to execute a mortgage:

> " . . . *may arise by implication, as from his or their being intrusted with the management and*

control of the corporate affairs or being otherwise held out as having such authority." (citing many cases) (Emphasis supplied)

As further stated in Fletcher, sec. 690;

> " . . . where a general manager is given practically the powers of the board of directors, or when the board becomes inactive or acquiesces in all the acts of one acting as general manager, a mortgage executed by him is binding upon the company."

Among the individual cases in which the above quoted rule has been applied to situations similar to this case are the following: *Abraham v. American Nat'l Bank,* 161 Okl. 87 (President left in control of business of corporation); *Nat'l State Bank v. Sanford Fork & Tool Co.,* 157 Ind. 10; *Tyler Estate v. Hoffman,* 146 Mo. App. 510; *G. V. B. Mining Co. v. First Nat'l Bank,* 89 F. 439 (arising in Idaho), aff. 95 F. 23; *Galbraith v. First Nat'l Bank of Alexandria,* 221 F. 386; *Cunningham v. German Ins. Bank,* 101 F. 977; *Farmers' State Bank v. Brown,* 204 N.W. 673; *Buchwald Delivery & Express Co. v. Hurst,* 75 A. 111; and *P. R. Sinclair Coal Co. v. Missouri-Hydraulic Mining Co.,* 207 S.W. 266.

As further stated in Fletcher, supra, sec. 444:

> "Oftentimes they (the directors) are mere dummies who hold no meetings for years and acquiesce in the entire management of the corporation by one or more of their number or by some officer . . . ; and where directors permit certain persons to control and conduct the affairs of the company, without protest or objection, the law presumes that all of them knew and acquiesced in what was done, and treats such acquiescence as equivalent to formal authority."

Finally, on this point, the officer of a corporation may have implied power to act arising out of an emergency to the same extent as the agent of an individual. As stated in 2 Am. Jur. on Agency, sec. 89:

> "On like principle, after authority had been conferred on the agent, there may arise such new and unexpected emergencies and necessities as will justify the agent in assuming extraordinary powers which, if exercised in good faith and with sound discretion, will bind the principal; in other words, there may be an implication of authority in the agent to act in such case in order that the agency purpose for which the relation was created may be effectuated. Accordingly, the rule advanced by the American Law Institute in this respect is that if, after the authorization is given, an unforeseen situation arises for which the terms of the authorization make no provision, and it is impracticable for the agent to communicate with the principal, he is authorized, in the absence of an agreement to a contrary effect, to do what he reasonably believes to be necessary in order to prevent substantial loss to the principal with respect to the interests committed to his charge."

3. Argument in Support of Implied Actual Authority to Execute Mortgage.

In this case the directors of an Idaho corporation admittedly conferred upon Camozzi a free hand to conduct all operations in Oregon (R. 23-5). This alone is sufficient to constitute implied and at least apparent authority under many of the authorities cited above.

But, in addition, Camozzi had been the principal promoter and stockholder of the corporation and was one of the three partners who previously owned and op-

erated the sawmill property (Ex. 19, p. 36; Ex. 1). Moreover, the directors, by holding only one meeting between the formal organization of the corporation in 1946 and after the execution of the mortgage in 1948 (Ex. 1) by failing to hold regular meetings as required by the by-laws (Ex. 24), and by exercising no direction or supervision over his actions and requiring no reports of his activities (Ex. 19, pp. 11-12, 19-25, 31-2; Ex. 20, pp. 5-6, 40-1) had acquiesced in all of his acts, had become completely inactive and had virtually abdicated or at least delegated virtually all of their powers to Camozzi. This is again recognized by clear implication in the resolution of November, 1948, divesting him of his previous "broad powers" and placing him under the direction and supervision of an executive committee, as he always should have been directed and supervised by the directors (Ex. 1). In addition, Barry, as Secretary-Treasurer, virtually abdicated his duties which required him to keep the corporate seal, keep records, keep the funds of the corporation, and submit complete statements of account each year (Ex. 19, pp. 30-1).

Thus, this is clearly a case in which the President and Manager was "entrusted with the management and control of the corporate affairs" and, in addition, a case in which the directors became "inactive and acquiesced in all of the acts of the one acting as manager." It follows, under the authority of C.J.S. and Fletcher, as noted above, together with the cases cited above (page 15), that Camozzi, as President and General Manager, had implied authority to do any act that he thought

necessary or proper for the best interests of the corporation, including the execution of a $10,000 mortgage.

Indeed the sum total effect of the inaction by the directors and the powers, both delegated to and assumed by Camozzi, was to do no more than to vest in him as manager *"full control* of the business and affairs of the corporation, when the Board of Directors is not in session," which the directors were authorized to do under Article IV, Sec. 8 of the by-laws (Ex. 24).

Finally, where the president of a foreign corporation is confronted with an emergency such as confronted Camozzi when his sales were stopped and his operations were threatened with an imminent shut-down as the result of the injunction of all sales (see p. 13, supra), his act of judgment in executing a small mortgage to enable the company to resume sales and continue operations was not an abuse of discretion and was within the scope of his implied powers to act in an emergency, under the established rule as set forth above.

4. Answer to Appellant's
Arguments and Authorities.

Appellant first (pp. 25-6) contends that plaintiffs relied solely upon Camozzi's own statements that he ran the business and that the fact of his lack of authority was called to the attention of plaintiffs, a statement wholly undocumented except for reference to the language in the mortgage referring to authority from the directors and to the affixing of the corporate seal, which was not done. But plaintiffs had a right to assume that

he had secured necessary authority from the directors and the fact that he did not have the corporate seal to affix is not conclusive to the contrary, particularly since the home office of the corporation was far away and in another state. Of more importance, authority of Camozzi is established by reference to the by-laws of the corporation and minutes of its meetings, by the testimony on deposition of its treasurer and of defendant Rudeen and upon other facts, many of which were admitted, and all apart from the statements of Camozzi to plaintiffs.

Appellant next (pp. 26-7) contends that the president or general manager of a corporation has no authority *by virtue of such position* to execute a mortgage covering all of its property, citing *American Nat'l Bank v. Bartlett,* 40 F. (2d) 21, which appellant states to be "almost on all fours." But that case did not involve "a 'one-man' corporation, the board of directors of which has abdicated," as in this case and the court in the *Bartlett* case expressly recognized that a different rule might apply in such cases, as well as in cases in which there had been a ratification of the mortgage (as also was true in this case, as discussed below, p. 23), and that authority, though not expressly given, may arise as a necessary implication from authority that is expressly granted (as also true in this case for reasons pointed out above, p. 14). A reading of the remaining cases cited by appellant (pp. 21-3, points 1, 2, 3, 5 and 7) reveals that they are no more controlling than the *Bartlett* case, and do no more than support the general proposition that a president or general manager cannot, *by virtue*

of such position alone, execute a mortgage, whereas in this case, for reasons pointed out above (pp. 16-18) there is much evidence, both direct and circumstantial, supporting the authority of Camozzi to execute this mortgage other than and in addition to the fact that he was president and general manager.

For the same reasons, the fact that plaintiffs' attorney, Mr. Balentine, was aware, as appellant next contends (p. 27) of the limitations upon the power of a president *in the usual case* to execute a mortgage and of the usual custom to affix the corporate seal, since he testified that, in his opinion, Camozzi had authority to execute this particular mortgage under the facts of this particular case (R. 107), and that opinion is fully supported by reference to the foregoing facts and authorities.

Finally, on this point, appellant contends (p. 28) that plaintiffs had the burden to establish the authority of a general manager to execute a mortgage upon corporate assets. But the general rule is to the contrary and places the burden on those who would deny that a corporate mortgage was properly authorized in view of the presumption of validity of such mortgages. 2 Am. Jur., Agency, sec. 442. In any event, the evidence in this case, and as set forth above, fully sustained any burden that plaintiffs might have had to prove the authority for the execution of this mortgage and fully supports the findings of the trial court on that point (R. 44-6). Indeed, it is significant that appellant does not challenge any of the facts set forth in Findings I and II, other than the alternate finding that Camozzi had authority to execute the mortgage.

B. *Camozzi Also Had Ostensible or Apparent Authority to Execute the Mortgage.*

In addition to the *implied actual* authority of Camozzi to execute the mortgage, its validity is also sustained by his *apparent* authority. The general rule on apparent authority of the officer of a corporation is stated in Fletcher, sec. 449, p. 257, as follows:

> "If a corporation, . . . or its directors, either intentionally or negligently, clothe a particular officer or agent with an apparent authority to act for it in a particular business or transaction, and persons deal with him in good faith, it will be bound to the same extent precisely as if such apparent authority were real."

and, on p. 264:

> "The public is compelled to rely upon the apparent authority of the conceded agents of such corporation, especially where, as managers or superintendents, they are placed in control of departmental affairs."

As stated in *Carstens Packing Co. v. Gross,* 131 Ore. 580, 584; 283 Pac. 20:

> "One dealing with a corporation must deal with its agents. He has a right to rely upon the apparent scope of the agents power."

See also 19 C.J.S. on Corporations, sec. 1062, p. 593. Here again, the burden of proof falls upon defendant. *Thomas v. Smith-Wagoner Co.,* 114 Ore. 69, 79; 234 P. 814, which also holds that the question to be decided in such cases is whether innocent third persons are reasonably justified in believing that the agent has author-

ity to do the act in question. (Id. at 73.) And the same evidence that tends to show implied authority may actually show apparent authority. Fletcher, sec. 449, p. 256.

Thus, the following cases, among others, hold that under facts similar to those involved in this case, as where the directors left the conduct of the business in the hands of the president, there was apparent authority to execute a mortgage: *Gore v. Richard Allen Mining Co.,* 61 Idaho 622; 105 P. (2d) 735; *Fischer v. Streeter Milling Co.* (N.D.), 234 N.W. 392 (dicta); *G. V. B. Mining Co. v. First Nat'l Bank of Halley* (C.A. 9), 95 F. 23, 30; *Merchants' Bank v. State Bank,* 10 Wall. (U.S.) 604; 19 L. Ed. 1008; *American Nat'l Bank v. Wheeler-Adams Auto Co.,* 141 N.W. 396; and *Burke v. Frederickson,* 268 N.W. 348, 352.

As previously stated, evidence of implied authority may also be considered on the question of apparent authority. Thus the same facts summarized above are also to be considered on this issue. In addition, it should be kept in mind that the corporation held Camozzi out as its sole and only representative in Oregon and as the one to make all decisions for the corporation in that State.

Thus, he had previously contracted the entire output of a mill costing over $200,000 to one purchaser—a decision of far more importance than the execution of a $10,000 mortgage (R. 25; Ex. 2, 3, 4). He had borrowed money, purchased timber and real property, all equipment for expansion of the sawmill, and had made all

decisions regarding its enlargement and operation and the sale of all of its products, as well as the application of the proceeds of such sales to creditors of the company —all admittedly within the scope of his actual authority from the directors of the company. (Id. See also Ex. 19, pp. 11-12, 19-25, 31-2; Ex. 20, pp. 5-6, 40-1.) The people in and about Klamath Falls, including plaintiffs, knew these things (R. 75, 110-2). So far as they were concerned Camozzi *was* the Great West Lumber Corporation and had power to do anything that he deemed necessary or proper in connection with its business and affairs. (Id.)

Thus it is clear, under the cases and authorities set forth above, that Camozzi at least had apparent authority to execute the mortgage and that the corporation and all those in privity with it, including defendant Rudeen, are estopped to claim the contrary.

C. *The Execution of the Mortgage Was Ratified by the Corporation.*

As this Court well knows, even "an unauthorized mortgage or pledge by the president of a private corporation is ratified by the corporation if it acquiesces in or accepts the benefits of the transaction." Fletcher, sec. 612, p. 528. See also sec. 706, citing many cases, including *West v. Washington Ry. Co.*, 49 Or. 436, 445-6; 90 P. 666. Again, ratification may be either express or implied. Fletcher, secs. 752, 767, and the same rules apply for satification by a corporation as by an individual. Id., sec. 752, p. 773; *Reid v. Alaska Packing*

Co., 47 Or. 215, 220; 83 P. 139. It has also been held that a presumption of ratification arises from failure to repudiate an unauthorized act. *State ex rel Sorenson v. Merchants' Bank of Weston, et al.* (Neb.), 254 N.W. 675, 678. While there must usually be knowledge of the facts by the principal, this requirement is satisfied where there are circumstances which would put a reasonable man on notice as if ignorance was the result of negligence or inattention to duty. Fletcher, sec. 757. As stated in *Cranston v. West Coast Life Ins. Co.,* 72 Or. 116, 130; 142 P. 762:

> "If the officers of the company had an opportunity to inform themselves of the facts and circumstances . . . and failed to do so, it would be equivalent to such knowledge."

Furthermore, as stated in Fletcher, sec. 757, pp. 787-8:

> " . . . knowledge upon the part of the corporation will be presumed from slight circumstances where it had the benefit of the contract."

Once actual or constructive knowledge is established, the final question is whether the corporation, by its conduct, has ratified the unauthorized act. Such ratification can be implied from accepting the benefits of the contract or in otherwise treating the contract as in force and also, under some circumstances, from silence or acquiescence or failure to disaffirm the contract. Fletcher, sec. 767.

As further stated in Fletcher, sec. 769:

> "When the officers or agents of a corporation exceed their powers in entering into contracts or

> doing other acts, the corporation, when it has knowledge thereof, must promptly disaffirm the contract or act and not allow the other party or third persons to act in the belief that it was authorized or ratified. If it acquiesces, with knowledge of the facts, or fails to disaffirm, a ratification will be implied, or else it will be estopped to deny a ratification."

and later:

> "After knowledge of the unauthorized contract the corporation must repudiate it within a reasonable time or else consent and approval will be presumed to have been given to the officers act or contract."

As the rule has been stated in Oregon in *Depot R. Syndicate v. Enterprise B. Co.*, 87 Or. 560, 575; 171 P. 223:

> "If a principal, when fully notified thereof, neglects promptly to disavow an act or contract of his agent in excess of his authority, such silence will usually be interpreted as an implied ratification, and particularly so, if the failure speedily to repudiate such conduct or agreement might impose upon the other party loss or injury."

In this connection, failure to disaffirm in one, two or three months has been held sufficient to constitute a binding ratification, according to cases cited in Fletcher, sec. 772.

In addition, when a corporation has accepted the benefit of an unauthorized contract, as a general rule it is considered as having ratified the contract, or will be estopped to deny the contract. Fletcher, sec. 773, p. 832, which goes on to state the following rule:

> "If benefits have been accepted, the corporation cannot disaffirm the contract without returning or offering to return the benefits received or otherwise placing the contracting party in status quo."

For specific cases on the question of ratification which apply the above rules of law to concrete factual situations and which, although sometimes involving facts different from those of this case, support plaintiffs' position that the corporation must be deemed to have ratified the mortgage, see *Currie v. Bowman,* 25 Or. 364, 376-7; 35 P. 848; *Pettengill v. Blackman,* 30 Id. 241; *Depot R. Syndicate v. Enterprise B. Co.,* supra; *Edelhoff v. Horner-Miller Straw-Goods Mfg. Co.* (Md.), 39 A. 314, 316; *Banca Italiana Di Sconto v. Columbia Counter Co.* (Mass.), 148 N.E. 105, 108; *Pathe Exchange, Inc. v. McElroy* (Mo.), 243 S.W. 430; *Indianapolis Rolling Mill v. St. L. F. S. & W. Ry.,* 120 U.S. 256.

As already stated (pp. 13-4) the whole purpose of the mortgage was to benefit the corporation by making it possible to release the then pending attachments and injunction which had stopped all sales of its products and would have shut down its operations. (See also R. 28.) The mortgage was recorded on or about August 5, 1948, giving notice to all the world (Ex. 10; R. 95). Later that month Rudeen became suspicious of Camozzi, but did nothing and made no investigation. Early in November the directors, including Rudeen, learned of the mortgage, but all they did was to question Camozzi about it (Ex. 1; Ex. 20, pp. 12-3; R. 141-3). No steps were taken to cancel or rescind the mortgage or to

notify plaintiffs of any claim of invalidity. (Id.) In December the attorney for the corporation purportedly advised that it was invalid (R. 141). Still nothing was done by the corporation (R. 142). As stated below, (p. 29) the stockholders and creditors, including plaintiffs, on January 6, 1949, were advised by director Rudeen that the mortgage existed and that the tax sale would be *subject to the mortgage,* with not one word as to any claim of invalidity. No such claim has ever been made to plaintiffs on behalf of the corporation and even Rudeen did not so contend to plaintiffs until long after the tax sale (R. 142).

It is thus submitted that since the corporation had the benefit of the mortgage, had constructive knowledge almost immediately thereafter and actual knowledge early in November, and then remained silent, acquiesced in the matter and took no move to cancel or rescind the mortgage or to notify plaintiffs that it was unauthorized —that under these facts and under the cases and authorities set forth above the corporation must be considered as having ratified the execution of the mortgage and cannot now claim the contrary.

This is particularly a case in which the rights of a creditor who in good faith relinquished such rights acquired under attachments and injunctions for a mortgage should not be destroyed by resort to the technical defense of ultra vires, as held in the Idaho case of *Burke Land & Livestock Co. v. Wells Fargo & Co.*, 60 P. 87, 93, involving somewhat comparable facts:

> " . . . the rule is that that doctrine (ultra vires) should not be applied when it would defeat the ends of justice or work a legal wrong."

To the same effect see *Ohio & M. Ry. Co. v. McCarthy,* 96 U.S. 258, and *Dillon v. Myers* (Colo.), 146 P. 268, 272.

Appellant has completely failed to challenge the findings of the trial court in the question of ratification (R. 46), despite the fact that these findings sustain the decision of the trial court in this case independently from any question of actual or apparent authority.

D. *Appellant Rudeen Is Not in a Position to and Is Estopped from Denying the Validity of the Mortgage.*

Another independent basis supporting the decision of the trial court completely unchallenged by appellant's brief is that appellant Rudeen, both because he claimed to purchase as an individual and also because of his representations and the general understanding that his purchase at the tax sale would be *subject to the mortgage,* is not in a position to and is estopped from challenging the validity of the mortgage.

As stated in Fletcher, supra, sec. 490:

> "As a general rule, if a corporation does not raise the objection that an officer or other person assuming to enter into a contract or do any other act on its behalf, and particularly if it has ratified the act, the objection of want of authority cannot be raised by third persons."

To the same effect see *Norment v. First Nat'l Bank* (N.M.), 167 P. 731, 732; *Shawmut Comm. Paper Co. v. Overbach* (Mass.), 101 N.E. 1000; and *Boteler v. Conway* (Cal.), 56 P. (2d) 587, 589. The Idaho law is to the same effect. See *Page v. Savage,* 246 P. 304, 8.

It is claimed by Rudeen that he did not purchase the mill on behalf of the corporation or its stockholders, but solely as an individual with his own funds (R. 136-8). This being the case, then since the corporation has never made any attempt to cancel or rescind the mortgage and has never advised plaintiffs that it considers the mortgage to be invalid for lack of authority, then under the cases and authorities cited above, Rudeen, as a third party is not in a position to question the validity of the mortgage.

Not only did Rudeen admit that he failed to inform plaintiffs of his alleged position that the mortgage was invalid until *after* the tax sale, but he engaged in affirmative conduct on which plaintiffs relied and should thus be considered as estopped by his own conduct from questioning the validity of the mortgage.

More specifically, Rudeen wrote a letter dated January 6, 1949 (Ex. 29), and addressed it to plaintiffs, among others. In that letter he stated that the "mill and mill site are covered by a mortgage in the original sum of approximately $10,000"; that "the personal property of the corporation will be offered for sale by the Department *subject to the $10,000 mortgage* hereinabove referred to," and that "there is no money in

the treasury of the corporation from which payment of any of the above-described debts can be paid. . . ."(Id.)

Before receiving this letter plaintiffs were concerned that the tax lien might be considered as a prior lien to the mortgage and that the tax sale might thus wipe out their mortgage lien (R. 82). They had thus begun to make arrangements at the bank looking toward the possibility of bidding in the property at the tax sale to protect their mortgage. (Id.) On the receipt of this letter, however, plaintiffs were clearly entitled from the above quoted language to assume that the corporation and Rudeen conceded that the mortgage was a valid prior lien and that the tax sale would be subject to the mortgage. Thus, quite naturally, plaintiffs had a right to and did rely upon this representation by abandoning negotiations with the bank and failing to bid at the tax sale (R. 82 and 100). And if Rudeen is permitted now to claim that the mortgage was not a valid lien upon the property plaintiffs will be seriously prejudiced by their reliance and by giving up their right to protect their interests by bidding upon the property.

In this way Rudeen was enabled to bid in for $7500. a sawmill and site costing over $200,000 and admits that he didn't tell plaintiffs his position that the mortgage was invalid until *after* the tax sale (R. 142). Since, as above stated, there was a representation by Rudeen that this purchase would be subject to the mortgage and since plaintiffs were entitled to and did rely to their prejudice, Rudeen should now be estopped from questioning the validity of the mortgage.

In addition, it was understood and agreed by all concerned at the time of the tax sale that the property was to be sold and purchased subject to the mortgage. Thus both plaintiff and his attorney, Mr. Balentine, testified that it was announced at the tax sale that the sale was to be subject to the mortgage (R. 85, 101). In this they were confirmed by the testimony of a Mr. Hale, and a Mr. Long, former timber buyers for the corporation (R. 113-4; 117). Appellant Rudeen testified only that he didn't know if such an announcement was made (Ex. 20, p. 24). In addition it must be remembered that Rudeen had written a letter on January 6, 1949, which recognized the validity of the mortgage and that the sale was to be subject to the mortgage and that he wrote a further letter after the sale stating that he had bought the mill subject to the mortgage (Ex. 29). Thus, the total effect of Rudeen's statements must be taken as an admission of his understanding at the time of the tax sale that the mortgage was valid (at least as to the real property and fixtures) and that the sale was subject to the mortgage at least to that extent.

Therefore, by bidding upon the property "subject to the mortgage" it must be considered that Rudeen agreed to the condition, with the result that it was understood and agreed by all parties concerned—government, mortgagee and purchaser—that the sale was subject to the mortgage.

In view of this understanding and agreement it is submitted that Rudeen is bound thereby and may not now renounce its terms and take the position that the mortgage was not valid and that the sale was not sub-

ject to the mortgage. And since the substance of the foregoing facts are incorporated in findings of fact by the trial court (R. 47-8) which have not been challenged by appellant in its opening brief, it is submitted that they are conclusive against appellant as an independent basis supporting the decision of the trial court and requiring its affirmance on appeal.

II. The court did NOT err in decreeing payment of taxes due to Klamath County.

Appellant next (p. 28) challenges the award by the trial court of $3,369.32 as taxes due to Klamath County on the mortgaged property. Appellees do not feel called upon to defend this award made to another party except to point out that: (a) The findings of fact state that the parties had stipulated that taxes were due in such amount (R. 50. The written stipulation, R. 64, not being included in the record on appeal); (b) The "Statement of Points" raised no such issue (R. 59, 163); (c) Neither the notice of appeal nor other appellate papers were served upon Klamath County, although it was an original party defendant (R. 57-61).

As to the further contention by appellant (p. 30) that the court failed to determine his rights under his tax deed, it should similarly be sufficient to point out that: (a) This prayer in defendant's answer (R. 17) was not repeated as a contention (R. 37) or made an issue (R. 38-9) in the Pre-Trial Order, except upon the question whether Rudeen's claim of title was subject to or free from the claim of plaintiffs and, by stipulation,

the pleadings were superseded by the Pre-Trial Order (R. 41); (b) That issue was determined by the finding that the tax sale was subject to the mortgage (R. 48) and by the conclusion that the mortgage was valid and superior to the interest secured from the tax sale (R. 51); and (c) The "Statement of Points" is limited to the sufficiency of the evidence to support affirmative findings and does not raise any issues on appeal involving the failure to make necessary findings, conclusions or other determinations (R. 59, 163).

III. The court did NOT err in including in its Findings and Decree a particular description of the property covered by the mortgage.

Appellant contends (p. 30) that since the mortgage contained only a general description of the property covered and since, as contended by appellant, there is no evidence to support the particular description in the decree, it was error to include such a particular description. The fallacy of this argument is that there *was* ample evidence in the record to support such a particular description.

It is important to note that appellant raises no issue of law on appeal in support of this contention and thus is not in a position to deny the rule that a mortgage on a manufacturing establishment by a general name or by terms generally understood to include all its essential parts passes all machinery belonging thereto, whether annexed to the freehold or not (36 C.J.S., Fixtures, sec. 46; *First State Bank v. Oliver,* 101 Or. 42, 51; 198 P.

920; *Metropolitan Life Ins. Co. v. Kimball,* 163 Or. 31, 52-3; 94 P. (2d) 1101); and that if this mortgage, by its terms, is not entitled to be given such an effect, it should be reformed to that end in order to carry out the intention of the parties (*Kramer v. Alvord,* 97 Or. 227, 231; 189 P. 990). Thus appellant does not now challenge the correctness of contentions to the foregoing effect made by plaintiffs in the Pre-Trial Order (R. 36) and on appeal makes only the limited contention that there is no evidence to support the particular description included by the court in its findings and decree.

The mortgage (Plaintiffs' Ex. 10) describes the property covered by its terms as follows:

> "NE¼ of SE¼ Section 13, Township 23, South Range 9 East Willamette Meridian, and a *complete sawmill installed thereon* with buildings consisting *among other things,* as follows:
>
> 2 circular saw headrakes
> Edger
> Automatic trim saw
> Conveyors
> Conveyor chains
> *Numerous gas engines and other equipment in connection therewith.*
>
> together with tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining." (Emphasis supplied. See also R. 16.)

Plaintiff Valentine testified that, according to his understanding at the time of his agreement with Camozzi and before the mortgage was executed, it was to cover "one complete sawmill and the land" (R. 72) and

that he did not then know all of the items of personal property at the sawmill, which was located 100 miles from the scene of the negotiations. (Id.)

Plaintiffs' attorney, Mr. Balentine, testified that in the instructions from Camozzi for the drafting of the mortgage he was told that Camozzi had no way of giving him an itemized description of the various pieces of personal property (R. 93-4) and only attempted to describe some of the larger items (which were specified in the mortgage), together with "the further specification of the complete sawmill equipment as it there existed," including also "numerous other gas engines and other equipment there" (R. 94-5).

It is thus of extreme importance to note that the following is included in the Pre-Trial Order as an Admitted Fact:

> "20. That on January 27, 1949 and since prior to August 4, 1948 Defendant, Great West Lumber Corporation was the owner of record of the following described real property in Klamath County, Oregon:
>
> The NE¼ of the SE¼ of Section 13, Township 23 S., Range 9 East of the W.M.;
>
> that on January 27, 1949, there was on the above described real property a complete sawmill, together with the items set forth in the notice of levy referred to herein or Defendant, Carl Rudeen's Pre-Trial Ex. 25. That the same personal property described above was also on the above described premises on August 4, 1948, and owned by said defendant on said date, except that one of the above described motors was acquired since that date and has since been released to the seller thereof." (R. 28-9)

A comparison of the items included in the Notice of Levy, Ex. 25, with the items included in the Findings and Decree (R. 48-50, 55-7) will reveal that all of the items in the Findings and Decree are also to be found in Ex. 25. Thus, contrary to appellant's claim, there is ample evidence in the record to support the description as given in the Decree.

Further supporting evidence, if any is needed, is to be found in the testimony of a company employee, Charles Scott, who identified all or nearly all of the items included in the final Findings and Decree as integral parts of the sawmill and also testified that all motors (of which there were several) were as a general rule, bolted to the concrete foundations (R. 153-160). It is thus submitted that more than sufficient evidence was submitted to support the determination of the trial court that the "complete sawmill" and the "numerous gas engines and other equipment in connection therewith" included all of the various items set forth in the Findings and Decree.

IV. The court did NOT err in holding that the mortgage was superior to the title claimed by defendant Rudeen under the tax deed.

Appellant next (pp. 21-2) contends that the mortgage was wholly void because no corporate seal was attached; that such a mortgage was not entitled to be recorded; that if it had not been recorded Rudeen's tax deed would have been superior to the mortgage and that therefore the court erred in holding the mortgage to be

superior to Rudeen's tax deed. There are at least four answers to these contentions, any one of which alone is sufficient to sustain the determination of the trial court on this question.

A. *The Mortgage Was NOT VOID for Lack of the Corporate Seal.*

Appellant has cited (p. 24) a number of cases, mostly decided over fifty years ago, in support of the contention that "a deed purported to be the deed of a corporation without seal is *void.*" While certain of these old cases may stand for such a proposition, most of them are to be distinguished, either upon the ground (1) That they depended upon statutes construed to require seals for corporate deeds (*Johns v. Gillian* (Fla.), 184 S. 140; *Garrett v. Belmont Land Co.* (Tenn.), 29 S.W. 726; *Littelle v. Creek Lbr. Co.* (Miss.), 54 S. 841; *Allen v. Brown* (Kan.), 50 P. 505; and, apparently, *Caldwell v. Morganton Mfg. Co.* (N.C.), 28 S.E. 475); (2) That they involved the execution of objections by a corporation to a bankrupt's discharge, a statutory proceeding (*In re Abramovitz,* 253 F. 299, and *In re Glass,* 119 F. 509); or (3) That they held only that such deeds were not entitled to registration or to admission in evidence from which it does not necessarily follow that they are wholly void (*Texas Consol. C. & M. Ass'n v. Dublin C. & M. Co.,* 38 S.W. 404, and *Fontana v. Pacific Can Co.* (Cal.), 61 P. 580).

In approaching this problem the general rules as to the need for seals upon corporate documents, as set

forth in Fletcher, supra, sec. 2466, p. 201, should be considered as follows:

> "It was at one time the rule that a corporation would not express its will, or enter into a contract except by an instrument under seal executed by a duly authorized agent. . . . The rule itself was at an early date relaxed and then departed from as a general proposition of law.

and, at page 202:

> " . . . it is now firmly established that unless its charter or the governing statute provides otherwise, a corporation may contract without use of its corporate seal in all cases in which natural persons can bind themselves without the use of a seal."

and, at page 204:

> "Although there is some authority to the contrary, the modern and more sensible doctrine is that the seal of a corporation itself performs no further or greater function than to impart prima facie verity of the due execution by the corporation of the written obligation."

and, at page 208:

> "Unless, therefore, there is some charter, or statutory provision requiring it, a corporation need not affix its seal to instruments relating to real property or to personal property."

and at pages 210-211, sec. 2467:

> "The above rules as to the use of corporate seals apply to instruments transferring or incumbering real estate.
>
> * * *
>
> "In the absence of statute, and to some extent as a rule of common law, a deed of corporate property should be under corporate seal."

and, finally, at pages 212-213:

> "Where by statute it is required that deeds of conveyance and mortgages be under seal, a deed or mortgage by a corporation must be under seal. . . .
>
> * * *
>
> "A deed insufficient as a conveyance of a corporation's legal title to real property, because not under seal as required by the law, may nevertheless be good in equity. . . ."

In Oregon it is provided by Sec. 2-804, O.C.L.A., as follows:

> "The seal affixed to a writing is primary evidence of a consideration. In other respects there is no difference between sealed and unsealed writings, except as to the time of commencing actions or suits thereon. . . ."

Section 2-807, O.C.L.A., also provides as follows:

> "The last three sections shall not be construed to dispense with a seal to a *deed* or other writing where the same is required by any statute of this state."

There are no statutes in Oregon requiring seals either upon mortgages or upon documents executed on behalf of corporations, thus placing them in the same category as individuals insofar as the necessity of seals upon documents.

It is true that in the old case of *Eagle Woolen Mills v. Monteith,* 2 Or. 277, it was held that the *deed* of a corporation must be sealed with the corporate seal. In another old case, *Brown v. Farmers Supply Co.* (1893), 23 Or. 541; 32 P. 548, it was stated by way of dictum that it is essential to the proper *execution* of a deed

or mortgage by a corporation that it be done . . . under its corporate seal, but the case was actually decided upon the ground that the mortgage in question did not purport to be executed by or on behalf of the corporation, but only by its officers, without even stating that they acted for or on behalf of the corporation. But in the *Brown* case it was recognized that a defectively executed mortgage "will, in a proper case, be enforced in equity as a mortgage. . ." To the same effect, as to unsealed deeds or mortgages, see 16 Am. Jur., Deeds, sec. 100, and 59 C.J.S., Mortgages, sec. 16, p. 52. Thus it is clear that in Oregon, even under the early *Brown* case an unsealed corporate mortgage was not void, as now contended by appellant.

Apparently no more recent cases have passed upon this problem and apparently none have considered the effect of the provisions of secs. 2-804 and 2-807, supra. But it has more recently been held in Oregon that in this state, contrary to many other states, a mortgage "does not convey the title nor does it create an interest or estate in the mortgaged property. It merely creates a lien or an encumbrance against the property as security for the payment of a debt. . . ." *Schleef v. Purdy,* 107 Or. 71, 77; 214 P. 137, 140. Thus, it is submitted, that while a deed may be considered as a mortgage under certain circumstances, a mortgage in Oregon cannot properly be considered as a deed. It follows under the terms of secs. 2-804 and 2-807 that a mortgage on real estate need not bear a seal in Oregon, whether that of an individual or corporation. *A fortiori,* a mortgage on

personal property in Oregon need not bear a corporate seal.

Moreover, and since the sealing of such a deed was recognized in the *Brown* case as going merely to "the proper execution" of the instrument, in Oregon, as under the modern rule as stated above by Fletcher, supra, at p. 204, the seal of the corporation performs no further or greater function than to impart a *prima facie* verity of the due execution by the corporation of such an instrument and that the absence of a seal merely shifts the burden of proof in this respect. Indeed this seems to be the view of appellant himself in another portion of his brief where (at page 22) he cites cases in support of the proposition that:

> "The burden of proof as to the authority to give a mortgage when the same is not under the corporate seal rests upon the party asserting the right."

See also Appellant's Brief, page 24, point 10.

It should not be necessary to repeat the evidence summarized above in order to demonstrate that plaintiffs in this case more than sustained the burden of proving that this mortgage was executed by the president of the corporation, acting under both actual and apparent authority from the corporation and that its execution was further ratified by the corporation.

B. *The Recording of a Mortgage not Entitled to Be Recorded, While not Conveying Constructive Notice May Still Operate as Actual Notice and One Who Takes a Subsequent Deed with Actual Knowledge of Such a Mortgage Cannot Complain.*

Appellant next (p. 31) contends that the mortgage, being without seal, was not entitled to be recorded and that his tax deed is thus superior to the mortgage. Of course appellees again contend, for reasons just stated, that no seal was necessary upon the mortgage, with the result that the absence of a seal would not prevent it from being entitled to recording.

But without abandoning this contention and assuming (for the purpose of argument alone, while still denying) that the mortgage in this case was not entitled to be recorded, it does not follow, as appellant contends, be recorded, it does not follow, as respondent contends, that his subsequent tax deed is superior to the mortgage.

In this case appellant, as a director of the corporation, admitted having knowledge of the mortgage at least by November, 1948 (R. 29) and by his letter of January 6, 1949 (Ex. 29) showed further knowledge of the mortgage prior to his purchase of the tax deed from the government on January 27, 1949.

> "The defendant, having had notice of the plaintiff's mortgage prior to taking his own, had all the notice the record of such mortgage could afford, and should be bound by such notice. To hold otherwise would make laws intended to prevent fraud the very instruments of fraud. . . . Record-

ing acts are for the purpose of giving notice to those who have none, and thereby prevent wrong, and not for the purpose of giving undue advantage to those who have notice and thus enabling them to purpetrate wrong. The defendant, having notice, was not a mortgagee in good faith."

To the same effect see *Musgrove v. Bouser,* 5 Or. 313, 316, holding that:

> "By our statute every deed not recorded, as required by law, is void, as against a subsequent purchaser in good faith and for a valuable consideration, whose conveyance shall be first recorded. It seems to be well settled in this country, 'both in law and equity, that our recording acts only apply in favor of parties who have acted in good faith' and it is therefore generally held that a conveyance, duly recorded, passes no title whatever, when taken with a knowledge of the existence of a prior unrecorded deed."

See also 45 Am. Jur., Records and Recording, sec. 172, that:

> "It is an elementary rule in the construction of recording laws that notice of an unrecorded instrument is equivalent to the recording of it, with respect to the person having such notice. . . ."

Luse v. The Isthmus Transit Railway Co., 6 Or. 125, cited by appellant (p. 25) is not to the contrary, but holds only that a president of a corporation, *as such,* has no authority to execute a mortgage.

Therefore, since appellant admits having had notice of the mortgage before he acquired his tax deed, he cannot complain even though the mortgage was not entitled to be recorded, and to hold otherwise would convert the recording laws into "instruments of fraud."

C. *Appellant, as a Director of the Corporation, Could Not Upon Taking a Tax Deed Claim That the Tax Lien Destroyed the Mortgage.*

There is a further and independent reason why Rudeen, who was a director of the corporation, could not purchase the corporate assets at a tax sale and then claim, as he does now, that the tax lien destroyed plaintiffs' mortgage.

As stated in 51 Am. Jur., p. 919:

> "It is a general principle of law that one who by virtue of an existing legal or contractual relation with another is under an obligation to such other person to pay the taxes on lands, but who omits to pay such taxes, can not be allowed to strengthen his title to such land by buying in the tax title when the property is sold as a consequence of his omission to pay the taxes on it; his purchase at the sale will merely operate as a payment of the taxes, and the title will be the same as it was before the sale, except that the lien for taxes is discharged."

and, at page 920:

> "The effect of the principle which precludes one under obligation to pay taxes from becoming the purchaser at a sale for delinquency in payment of taxes cannot be evaded by such person by allowing the property to be sold to a third person and then purchasing it from him, by organizing a corporation and causing the tax deed to be made to it, or by any other collusive arrangement which would directly or indirectly defeat the operation of the rule."

Moreover, as stated in 13 Am. Jur., p. 960:

> "There are many cases supporting, either directly by the holding or indirectly by the language of

> the opinion, the general rule that a director or officer of a corporation has no right to purchase the corporate property at a judicial or other public sale, and that if he does so, the sale is voidable. . . . In order to have the sale disaffirmed, actual fraud or prejudice to the complainant need not be shown."

and, at page 962:

> "Furthermore, in those jurisdictions where the purchase of a corporate property at a judicial or other public sale by an officer or director of the corporation is upheld, provided the transaction is accomplished with good faith and full disclosure of the facts, the burden of establishing the bona fides of the transaction is upon the purchaser. The validity of the sale is affected by the adequacy or inadequacy of consideration, and a purchase at a grossly inadequate price is very strong, if not almost conclusive, evidence of fraud or bad faith."

See also 76 A.L.R. 439 (Anno.), and *Enyart v. Merrick,* 148 Or. 321, 331; 34 P. (2d) 629.

The facts of this case clearly show that Rudeen, at the time of his purchase at the tax sale of January 27, 1949, was a director of the corporation; that both previously and after the sale he had attempted to consummate arrangements under which the purchase could be made on behalf of either the corporation, its stockholders, or a reorganized corporation of the same stockholders and that at the time of the purchase it was his intention to purchase the mill for such a purpose. (See minutes of meetings, Ptfs. Ex. 1; letters by Rudeen, Ptfs. Ex. 29; see also deposition of Rudeen, Ptfs. Ex. 20, pp. 15-22, 29-31; testimony of Rudeen, R. 124-8, 136-7.) Thus it is clear that at the time of his purchase Rudeen

intended to purchase the mill for the benefit of the stockholders. This being his intent at that time, his professed subsequent change of intent is both immaterial and so incongruous as to be unworthy of belief. Thus the rule as stated above from 51 Am. Jur. applies and the purchase must be deemed to operate merely as a payment of the taxes, but still subject to all other liens.

On the other hand, if Rudeen is to be believed in his contention that he purchased as an individual, then since he was at that time a director and paid only $7500 for a sawmill costing over $200,000 (Exs. 2 and 3), it must be held that the rule as stated above from 13 Am. Jur. applies and that the purchase at such an inadequate consideration is invalid; that Rudeen has not established the burden of proving that the sale was in good faith, and that the sale should be set aside for the protection of creditors whose claims would otherwise be completely wiped out, all to the unjust enrichment of a director of the corporation.

Therefore, it is submitted that defendant's contention that his purchase at the tax sale gives him good title cannot be sustained.

D. *The Representations and Agreement That the Tax Sale Would Be SUBJECT to the Mortgage Is an Independent and Conclusive Answer to the Contention That the Tax Title Is Superior to the Mortgage.*

The final and conclusive answer to appellant's contention that his tax deed is superior to plaintiffs' mort-

gage is that for the reasons and upon the evidence set forth above (pp. 28-32), it was represented by appellant prior to the tax sale that that sale would be subject to the mortgage and it was further announced and agreed at the time of the tax sale that it would be subject to the mortgage. The trial court made express findings of fact to this effect (R. 48) and the sufficiency of the evidence to support such findings has nowhere been challenged by appellant in his brief. Thus appellant cannot now contend that his tax title is superior to plaintiffs' mortgage.

V. Rule that statements of agent not admissible against principal to prove extent of his authority not applicable where, as here, the point is not properly raised on appeal; a third party, rather than principal, is involved and authority was proved by other evidence.

Appellant's final contention (p. 32) is that the court erred in admitting Camozzi's own declarations as evidence of his authority to execute the mortgage. The answer to this contention is three-fold:

(a) This appeal was limited by appellant's Statement of Points to the sufficiency of the evidence (R. 59, 163) and, further, no proper specification of error was set forth in appellant's brief to raise any question concerning the admissibility of such evidence, as required by Rule 20(1)(d) of this Court.

(b) The rule relied upon by appellant (pp. 23, 32) is that statements upon the authority of the Restate-

ment of Law of Agency, sec. 285, of the agent concerning the extent of his authority are not admissible "against the principal." Here the principal, Great West Lumber Corp., was in default and did not appear. The only defense was by appellant Rudeen who, not being the principal, but posing as a third-party purchaser at the tax sale, cannot seek the shelter of this rule.

(c) The rule, as stated by appellant (p. 23), is subject to further exception where "it appears by *other evidence* that the making of such statement was within the agent's authority or as to persons dealing with agent with *apparent authority* or other power of the agent." In this case there was ample "other evidence," as set forth above (pp. 16-17, 22-3) that Camozzi had both implied actual and also apparent authority to execute the mortgage and, as thereby demonstrated, it is not the fact, as appellant again contends (p. 32), that the "only evidence" of Camozzi's authority was "his own declarations and statements."

For the reasons and upon the authorities set forth in the foregoing brief it is respectfully submitted that the judgment and decree of the trial court are amply supported by the evidence on any one of several independent grounds and should therefore be affirmed.

Respectfully submitted,

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